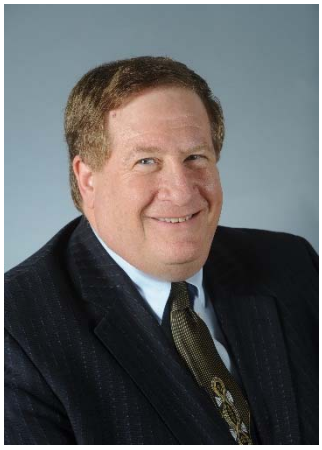
PSC PROFESSIONAL SERVICES COUNCIL
The Voice of the Government Services Industry

Alan L. Chvotkin, Esq.
Executive Vice President & Counsel



Alan L. Chvotkin is the executive vice president and counsel of the Professional Services Council, the principal national trade association of the government technology and professional services industry, where he is responsible for the association's legislative and regulatory policy activity.

Prior to joining PSC, he was a vice president of AT&T Government Services where he was responsible for managing key AT&T programs and opportunities. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Chvotkin also has 13 years of experience as a professional staff member on Capitol Hill, serving first as a staff member on the Senate Budget Committee and, later, the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee and then counsel to the Senate Armed Services Committee.

Chvotkin is a member of the American, Supreme Court and District of Columbia Bar Associations and a fellow of the National Contract Management Association, where he serves on its national board of advisors. He is also a founding member and continuing leader of the federal contracting industry's Acquisition Reform Working Group, which was established in 1993. He also co-chairs the operating committee of the Council of Defense and Space Industries Association. For his service to the contracting community, he twice received the prestigious Fed 100 Award.

He has a law degree from American University's Washington College of Law, a master's in public administration and a bachelor's in political science, both from American University.

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Statement of
Alan Chvotkin, Esq.
Executive Vice President & Counsel
Professional Services Council

"Federal Workforce Tax Accountability"

Subcommittee on Government Operations

House Committee on Oversight and Government Reform

U.S. House of Representatives

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4401 Wilson Boulevard, Suite 1110, Arlington, Virginia 22203 P: 703-875-8059 F: 703-875-8922 www.pscouncil.org

Introduction

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, thank you for the invitation to testify before you this morning on behalf of the Professional Services Council's nearly 400 member companies and their hundreds of thousands of employees across the nation.[1] This committee is rightfully focused on ensuring that appropriate steps are being taken to ensure the all taxpayers—whether a contractor, grantee, a contractor or grantee employee, a federal civilian employee or a member of the uniformed military—are complying with existing tax laws and paying their taxes.

PSC is also a strong proponent of creating a fair, balanced, and competitive federal contracting marketplace with a level playing field for businesses that wish to compete for federal contracting opportunities. No entity should have an unfair competitive advantage by failing to pay taxes over those firms that pay their taxes. Companies that violate the tax laws should be held accountable for those violations and punished accordingly. In addition, in the federal contracting market, those companies should be carefully evaluated to ensure they are "presently responsible" parties before being eligible to receive future federal contracts. There has been substantial activity in this area in the past several years.

We also support initiatives that take into consideration an individual's tax law compliance as part of any required background investigation or security clearance adjudication or reinvestigation and this testimony addresses this issue, as well.

Oversight of Contractor Tax Compliance

There has been a great deal of attention and oversight to understanding federal contractor compliance with federal tax law. Of course, the principal requirements are found in the federal tax laws and the compliance regimes and audit activities undertaken by the Internal Revenue Service (IRS) to ensure that all businesses are adhering to our nation's tax code. There are also provisions in the Federal Acquisition Regulation (FAR) to identify and take action against contractors that have failed to

[1] For over 40 years, PSC has been the leading national trade association of the government technology and professional services industry. PSC's nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

comply with the tax laws.[2] However, enactment of inconsistent legislative provisions over the past several years, predominately within the various appropriations laws, and interim guidance from agencies seeking to get ahead of FAR rulemaking activities, have led to inconsistent and confusing federal contracting policies.

First, the FAR directly addresses contractor compliance with federal tax laws. FAR Part 9 addresses contractor debarment, suspension and ineligibility. It specifically includes, within an enumerated list of causes for suspension or debarment, the authorization to act against a contractor "for having delinquent federal taxes in an amount that exceeds $3,000." FAR Part 9 also contains guidance about what constitutes a "delinquent tax debt" and clearly provides that such debts must be "finally determined," meaning that there is not a pending administrative or judicial challenge and all judicial appeal rights have been exhausted. FAR Part 9 also states that a contractor is not "delinquent" where it has entered into an installment agreement with the IRS and the FAR provides examples of such installment plans. The FAR also provides for certain protections for contractors that have filed for bankruptcy protection.

To identify contractors that may have violated federal tax laws or that have a tax delinquency, the System for Award Management (SAM)[3] requires companies to certify that they have not been convicted of, or had any civil judgments rendered against them, because of any tax evasion or violations of federal tax law. SAM also requires contractors to annually certify whether or not they have been notified of any delinquent federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied. Lastly, the SAM registration process includes an automated matching of the contractor's Tax Identification Number against the IRS' records. A false certifications in SAM can also be a violation of the False Statements Act, which can result in significant penalties for contractors, and is an independent cause for evaluating a contractor's "present responsibility" for being awarded federal contracts.

Within the Treasury Department there is a program that can match federal payments, including contract payments, to individuals or companies that are not tax compliant. The

[2] The FAR only applies to federal contracts. There are separate regulations that cover federal grants. (See the Final Rule "Federal Awarding Agency Regulatory Implementation of Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," published on December 19, 2014 and effective December 26, 2014, available at http://www.gpo.gov/fdsys/pkg/FR-2014-12-19/pdf/2014-28697.pdf). The FAR does provide for reciprocal recognition treatment of procurement and "non-procurement" suspension or debarment.

[3] SAM is the federal contractor registration system that all prospective federal contractors must use to routinely enter detailed information about their company in order to be eligible to compete for federal contracts.

program, title the Federal Payment Levy Program,[4] is managed by Treasury's Financial Management Services. It cross references the known tax delinquent accounts with any pending federal payments that are due to an individual or a company. Under the program, Treasury is authorized to withhold a percentage of any federal payment in order to satisfy any federal tax debt. Typically the withholding amount is 15 percent of the payment, but for a federal contractor payment, Treasury is authorized to withhold up to 100 percent of the payment.

Despite these clear and effective initiatives to ensure contractor compliance with federal tax laws, policy riders regarding contractor compliance with tax laws have been included in a myriad of appropriations laws over the past several years. In the Consolidated Appropriations Act of 2012[5] there were five individual provisions in different divisions of that law that prohibited contracting with entities that had unpaid tax debts unless the covered agency suspension and debarment official had reviewed the case and determined that suspension or debarment was not necessary to protect the government's interest. In the fiscal year 2015 Consolidated and Further Continuing Appropriations Act (CR-omnibus),[6] two provisions were included. One provision imposed a government-wide approach and was included in the general government section of Division E (covering Financial Services and General Government);[7] the other (dissimilar) provision was applicable to only those agencies covered by Division B (Commerce, Science and Justice) of the CR-omnibus Act.[8] Unfortunately, the language in Division B uses different certification requirements, is triggered by different monetary thresholds, and is entirely silent about the role of the covered agencies' suspension and debarment officials. These different approaches adopted via appropriations acts makes it difficult to achieve a truly government-wide approach and also creates significant confusion within the government and contractor communities about the reporting and compliance requirements and the subsequent processes agencies will follow if there is an actual or reported tax delinquency.

These statutory provisions also differ from the existing FAR structure, primarily by failing to include a de minimus threshold that would constitute a "delinquent tax debt" and by failing to include meaningful definitions of other key terms, such as when a tax debt has

[4] General information about the Federal Payment Levy Program is available at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Federal-Payment-Levy-Program.
[5] P.L. 112-74
[6] P.L. 113-235
[7] Section 735
[8] Section 523

not been "fully adjudicated." Currently, the Defense Acquisition Regulation Council has the lead role in developing a FAR interim rule[9] to implement the two provision in the fiscal year 2015 CR-omnibus, but it is not yet clear how the discrepancies between these two provisions, and with FAR Part 9, will be addressed. In addition, the Department of Defense has issued a Class Deviation establishing its own contract clause that is to be immediately included in DoD contracts. That clause requires DoD contractors to represent whether they have, or do not have, any unpaid tax liabilities.[10]

To complete the snapshot of the current landscape, stand-alone legislative proposals have been introduced in both the House and Senate that address contractor and grantee compliance with tax law.

Is Legislation Needed?

The bill that has garnered the most recent attention on this topic was the "Contracting and Tax Accountability Act of 2013" (H.R. 882), introduced in the last Congress by the now chair of the full committee, Congressman Jason Chaffetz. A nearly identical version of H.R. 882—also introduced by Chairman Chaffetz—was introduced this week. The Contractor and Tax Accountability Act of 2015 requires that the head of any executive agency that issues a solicitation for a contract, or that offers a grant, in an amount greater than the simplified acquisition threshold (currently set at $150,000) to (1) require each offeror to certify that such person does not have a seriously delinquent tax debt; and (2) authorize the Secretary of the Treasury to disclose information limited to describing whether such person has a seriously delinquent tax debt. Under the bill, an affirmative self-certification of a seriously delinquent tax debt is considered to be definitive proof that the person is not a responsible party and, as such, would prohibit the award of the contract or grant to the offeror. The bill further requires contractors and grantees found to have a ''seriously delinquent tax debt''—whether they be identified via self-certification or by the Treasury verification—to be considered for suspension or debarment, unless waived by the agency head.

PSC believes that the current FAR provisions, which have been in place since 2008, have had a positive impact on addressing federal contractor compliance with federal tax laws. Legislation that codifies, clarifies, and offers minimally invasive improvements to the Federal Acquisition Regulation could be beneficial. However, such legislation must be

[9] FAR Case 2015-011

[10] See DFARS Class Deviation 2015-O0005: "Class Deviation—Prohibition Against Using Fiscal Year 2015 Funds to Contract with Corporations that Have an Unpaid Tax Liability or Felony Conviction Under Federal Law," December 29, 2015, available at http://www.acq.osd.mil/dpap/policy/policyvault/USA007416-14-DPAP.pdf.

tailored carefully to avoid creating new challenges or points of confusion. The Contractor and Tax Accountability Act of 2015 is a step in the right direction, but PSC has several recommendations aimed at improving the bill text to better align it with current regulations and practices.

First, the FAR requires all federal contractors, regardless of the dollar value of their contracts, to register and annually update their business information in SAM in order to be eligible to receive a federal contract. As I stated earlier, it is in SAM that contractors represent whether or not they have any delinquent tax debts. The Contracting and Tax Accountability Act of 2015, however, requires contractors to represent their tax delinquent status on a contract-by-contract basis for any contract that is above the simplified acquisition threshold. Because of the inclusion of the simplified acquisition threshold in the bill, it is possible that a company that has represented that they currently have a seriously delinquent tax in SAM would escape having to make a similar representation on a contract that has an estimated value below the simplified acquisition threshold. It should also be noted that contracts below the simplified acquisition threshold are typically performed by small businesses. While we have not conducted any analysis of reports of contractor non-compliance with federal tax laws, on the surface many of the publicly available reports suggest that contractor tax non-compliance occurs most frequently among sole proprietors or other small businesses. PSC is a strong proponent of reducing government-unique reporting and compliance burdens, particularly for small businesses, but we believe that on the issue of tax compliance, all companies—regardless of size—should be treated consistently. Therefore, PSC recommends that the reference to the simplified acquisition threshold be removed from the bill.

The Contracting and Tax Accountability Act of 2015 is also silent on establishing a de minimus threshold that would clearly define a "seriously delinquent tax debt." FAR Part 9 includes such a threshold, set at $3,000. This committee's written report to accompany H.R. 882 from the 113th Congress stated that the IRS typically does not issue a notice of lien unless the debt exceeds $10,000.[11] To avoid confusion and better align the bill with the FAR, PSC recommends that the bill specifically reference the $10,000 de minimus threshold within the definition of "seriously delinquent tax debt." Additionally, the bill should require the current FAR threshold of $3,000 to be updated to reflect the $10,000 threshold in the bill.

[11] See House Report 113-35 (to accompany H.R. 882), April 12, 2013, at https://www.congress.gov/113/crpt/hrpt35/CRPT-113hrpt35.pdf.

PSC also recommends that the bill be revised to clarify that seriously delinquent tax debts only are defined as such if they have been "finally determined." FAR Part 9 provides that delinquent tax debts must be "finally determined" before triggering any suspension and debarment proceeding. FAR Part 9 also clarifies that a tax liability is not "finally determined" if there is a pending administrative or judicial challenge. FAR Part 9 also includes specific examples regarding when a liability would not be considered "finally determined" and exempts liabilities that are being repaid through IRS managed installment agreements. While the Contracting and Tax Accountability Act of 2015 closely mirrors some of the exclusions enumerated in the FAR with regard to pending appeals of tax liens and installment agreements, it does not clearly state that all delinquencies must be "finally determined" before a suspension or debarment action is initiated. Clarifying this issue by adding such qualifier would help while preserving the intent of the legislation.

PSC also recommends including language in the bill regarding the suspension and debarment procedures that should be followed in the event that a company, the IRS or a contracting agency identifies a contractor with a seriously delinquent tax debt. FAR Part 9 has well-established procedures for suspension or debarment that include a number of due process protections for contractors. While we believe that FAR Part 9 would likely be followed for any contractor disclosure of tax delinquency, it would be helpful if the bill specifically referenced the FAR Part 9 procedures.

Lastly, to avoid any confusion between the enacted fiscal year 2015 CR-omnibus appropriation act and those prior appropriations provisions discussed earlier in this testimony, PSC recommends that the Contractor and Tax Accountability Act of 2015 either repeal those provisions or clearly state that the provisions of the bill supersede all prior appropriations act provisions.

Cleared Contractor and Federal Employee Compliance with Tax Law

The invitation letter to testify today also requested that PSC comment on the vulnerability posed by tax delinquent workers, including federal employees and contractor personnel, with security clearances.

An assessment of a contractor employee's or a federal employees' current compliance with tax law is, and should be, a factor in the initial security clearance background investigation and federal adjudication process. It is, and should be, taken into account in the periodic reinvestigation of an individual's continued suitability to hold a security clearance. We support the current federal government adjudication guidelines that

evaluate the "whole person" when considering the specific impact of any single behavior and see no need to change those adjudicatory guidelines. However, if there are to be any changes to the security clearance processes or adjudication standards regarding tax law compliance, it must treat all individuals who are applying for or holding a clearance—whether a federal employee, a member of the military, officials from state or local governments, or contractor personnel—equally.

It is important to note here, too, that federal contracting companies have little ability to address cleared personnel's compliance with tax law because it is the federal government that manages the background investigation and the adjudication of personnel that require a security clearance to perform functions under the contract. When contractor personnel are denied a security clearance—for whatever reason—limited information about why the clearance was denied is shared by the government with the contractor employee's company. Individual privacy protections are the primary reason that limited information is shared. Similar privacy protections exist under the Internal Revenue Code that would make it very difficult for federal contracting companies to police the tax compliance of their employees.

All employees with a clearance are also required to disclose to their security officer or to the agency sponsoring their clearance any "adverse information," but the experience of many is that the strong economic interests of having a clearance and the fear of the immediate denial of that clearance often mitigates against individual disclosures. In addition, since there are no clear standards for determining what tax status is "adverse," many cleared individuals do not believe they have an obligation to report on such information.

That said, we do believe there are opportunities that can improve overall compliance with tax law by cleared personnel regardless of whether they are federal or contractor employees. In the post-Sargent Manning and Navy Yard events, continuous evaluation and monitoring is one evolution that may be able to offer benefit on this front. Under current security clearance processes, a one-time snap shot is taken of the financial standing and other criteria of a person being considered for granting an initial clearance. Furthermore, since the re-evaluation of cleared personnel holding confidential, secret, or top secret clearances only occurs every 15, 10, or 5 years respectively, it is possible that personnel with seriously delinquent tax debts (or other behaviors) could go undetected for several years. However, technological and other advances associated with the background investigation process has led the federal government to undertake several pilot programs to evaluate the feasibility of the continuous monitoring and

evaluation of cleared personnel to regularly identify any facts that would suggest the need for a more frequent evaluation of a person's suitability for a clearance.

Conclusion

Chairman Meadows and Ranking Member Connolly, thank you for inviting PSC to testify today on these important issues. Before taking any further action on the Contractor and Tax Accountability Act of 2015 that Chairman Chaffetz and the committee staff have worked diligently on, we hope the committee will adopt our recommendations for improvements. We believe that our recommendations provide helpful clarifications while still preserving the PSC-supported intent of the legislation. We also look forward to working with you and your staff on viable options for addressing the related concerns about security clearances.

I look forward to answering your questions.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Alan Chvotkin

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

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3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.
Signature:

Date: 3/16/15